

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-013746

02/20/2018

COMMISSIONER DAVID W. GARBARINO

CLERK OF THE COURT
L. Brown
Deputy

JOSEPH MOMOT, et al.

KRYSTLE DELGADO

v.

SILKWORTH MANOR L L C, et al.

SILKWORTH MANOR L L C
NO ADDRESS ON RECORD

BANK OF AMERICA N A
800 SAMOSET DR
NEWARK DE 19713
ADAM E HAUF
RANDY NUSSBAUM

MINUTE ENTRY

Plaintiff/Judgment Creditor Roxanne Momot seeks sanctions against Defendant/Judgment Debtor Silkworth Manor, LLC (“Silkworth”) and its counsel for failure to appear for a court-ordered judgment debtor examination and for failure to produce all documents requested in the related orders setting the dates and times for the examination.¹ Silkworth and its counsel oppose Ms. Momot’s requests for relief.² In addition, Silkworth asked the Court to quash

¹ See Request for Finding of Contempt and Motion for Sanctions; Reply in Support of Request for Finding of Contempt and Motion for Sanctions; First Amended Request for Finding of Contempt and First Amended Motion for Sanctions; Reply in Support of First Amended Request for Finding of Contempt and First Amended Motion for Sanctions.

² See Defendant/Judgment Debtor’s Response to Plaintiff’s Request for Findings of Contempt and Motion for Sanctions; Defendant/Judgment Debtor’s Response to Plaintiff’s Amended Request for Findings of Contempt and Amended Request for Sanctions.

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a Subpoena Duces Tecum directed to and served upon Bank of America (“BofA”).³ Ms. Momot opposes Silkworth’s request.⁴ The Court held oral argument regarding these matters on January 22, 2018. This is the Court’s decision.

REQUEST FOR SANCTIONS

A. Background

The Court set the judgment debtor’s examination at issue for September 5, 2017, by an order entered on August 1 (the “August 1 Order”). The August 1 Order directed Silkworth to appear, and included an itemized listing of documents to be produced. Defendant John Mulligan is the sole member of Silkworth. Ms. Momot appeared at the examination through counsel, but no other parties appeared. For reasons discussed on the record, the examination was continued to October 10 as explained in the related minute entry. Ms. Momot appeared at the continued examination through counsel, but no other parties appeared. For reasons discussed on the record, the examination was continued to November 14 as explained in the related minute entry. At the continued examination on November 14, Mr. Mulligan appeared and the examination proceeded. Ultimately, at Ms. Momot’s request, the Court continued the examination to January 23, 2018 because Silkworth failed to produce certain documents requested.

At the time the judgment enforcement proceedings took place, an appeal was pending, but no stay of execution had issued and no supersedeas bond had been posted. Ms. Momot served the first order setting the judgment debtor’s examination upon Silkworth’s counsel via mail and email. Silkworth’s counsel, however, claimed that such service was defective. Ms. Momot served the second order continuing the judgment debtor’s examination upon Silkworth via the Arizona Corporation Commission (“ACC”) after attempts to serve the Silkworth’s statutory agent were thwarted by the gates of a gated community. Ms. Momot’s counsel emailed Silkworth’s counsel to inform him that Silkworth had been served via the ACC. Silkworth’s counsel, however, claimed again that such service was defective.

³ See Defendant/Judgment Debtor’s Emergency Motion to Quash Judgment Creditor’s Subpoena Duces Tecum (the “Motion to Quash”); Judgment Debtor’s Reply to Judgment Creditor’s Response to Emergency Motion to Quash Subpoena Duces Tecum to BofA.

⁴ See Response to Judgment Debtor’s Emergency Motion to Quash Judgment Creditor’s Subpoena Duces Tecum

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Ms. Momot now asks the Court to find Silkwoth in contempt and award sanctions against Silkworth and its counsel.

B. Discussion

The Arizona Supreme Court described contempt as follows:

Contempt has been broken down into four classifications: criminal contempt is the commission of a disrespectful act directed at the court itself which obstructs justice; civil contempt is the disobedience of a court order directing an act for the benefit or advantage of the opposing party to the litigation; direct contempt is an act committed in the presence of the court or so near thereto as to obstruct the administration of justice; and constructive or indirect contempt is an act committed outside the presence of the court. There must always be some combination of these classifications. Also, the same acts may be both criminal contempt and civil contempt, and quite often are. The classification of contempt as criminal, civil, direct or indirect is merely a judicial device for determining the procedure to follow in each case.

Ong Hing v. Thurston, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966) (citations omitted). In this case, Ms. Momot alleges that the Silkworth disobeyed the August 1 Order by failing to appear in Court. Accordingly, Ms. Momot is alleging direct civil contempt.

Direct civil contempt may be determined summarily. *Id.* at 99, 416 P.2d at 423. As explained by the Arizona Court of Appeals in *Lund v. Donahoe*, 227 Ariz. 572, 583, ¶ 41, 261 P.3d 456, 467 (App. 2011), “[a] finding of civil contempt requires that the contemnor (1) has knowledge of a lawful court order, (2) has the ability to comply and (3) fails to do so.” (citing *Ong Hing*). The party seeking civil contempt has the burden to demonstrate these elements by “clear and convincing evidence” *BMO Harris Bank Nat. Ass’n v. Bluff ex rel. County of Yavapai*, 229 Ariz. 511, 513, ¶ 6, 277 P.3d 216, 218 (App. 2012) (quoting *Fed. Trade Comm’n v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir.1999)).

First, there is no dispute that Silkworth had knowledge the August 1 Order. Ms. Momot’s counsel sent it to Silkworth’s counsel by mail and email which was appropriate pursuant to Rule 5(c). Rule 5(c)(4), Ariz. R. Civ. P., which governs service after judgment, only applies when the time to appeal has expired or an appeal is complete:

After the time for appeal from a judgment has expired **or a judgment has become final after appeal**, a motion, petition,

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complaint, or other pleading requesting modification, vacation, or enforcement of that judgment must be served in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable.

(Emphasis added.) In this case, the appeal was pending at all times relevant to the Court's analysis. Accordingly, the initial August 1 Order was properly served upon Silkworth's counsel by mail and email. Silkworth's objections to the service of the August 1 Order had no merit.

Second, no argument or evidence was presented that demonstrated that Silkworth could not comply with the August 1 Order.

Finally, Silkworth did not comply with the August 1 Order.

Based upon the foregoing analysis, an order finding Silkworth in contempt is appropriate.

C. Conclusion

Based upon the contempt finding,

IT IS ORDERED that Ms. Momot is awarded her attorneys' fees and costs incurred from August 1 to November 14 in procuring Silkworth's appearance at the November 14 examination, and her attorneys' fees and costs incurred in prosecution of the Request for Finding of Contempt and Motion for Sanctions and First Amended Request for Finding of Contempt and First Amended Motion for Sanctions. Ms. Momot shall file an application for attorneys' fees and costs for the Court's review.

IT IS ORDERED declining to award award sanctions against Silkworth's counsel as the August 1 Order was not directed to him.

REQUEST TO QUASH SUBPOENA

In an effort to obtain information regarding Defendant's assets, Ms. Momot caused a Subpoena Duces Tecum to be issued and served upon BofA (the "Subpoena"). Silkworth Manor objects to the Subpoena on the grounds that it seeks privileged information. Specifically, it objects that cancelled checks that may be produced may contain names of Silkworth's clients/customers which would violate the Health and Information Patient Privacy Act ("HIPPA") and/or other federal laws related to drug and alcohol abuse patient records. Silkworth made similar objections when it was asked to produce such cancelled checks.

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The problem with Silkworth's argument is that it could have obtained the cancelled checks and redacted patient names where required. By simply asserting a blanket objection, however, Silkworth is likely covering many checks that do not identify names of Silkworth's clients/customers. Nevertheless, the Court is reluctant to allow the production by BofA. Accordingly,

IT IS ORDERED that Silkworth shall obtain copies of the requested checks from BofA, make the necessary redactions, and produce those checks to Ms. Momot within thirty days from this entry of this minute entry.

IT IS FURTHER ORDERED that the Motion to Quash is granted only to the extent that it requests cancelled checks, and that all other documents identified in the Subpoena Duces Tecum shall be produced.